

SETTLEMENT AGREEMENT

WHEREAS on October 7, 2003, Missouri Coalition for the Environment ("Plaintiff"), filed a complaint in the United States District Court for the Western District of Missouri against the Administrator of the United States Environmental Protection Agency, and United States Environmental Protection Agency (collectively "EPA" or "Defendants"), invoking jurisdiction under the CWA, 33 U.S.C. § 1251 *et seq.*, for EPA's alleged failure to comply with Section 303(c) of the CWA, 33 U.S.C. §§ 1313(c), and under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-59, 701-706, for alleged acts and omissions in violation of the CWA;

WHEREAS, the parties have entered into a Consent Decree in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.), that sets forth certain EPA commitments regarding Claims Two through Eight of Plaintiff's Complaint;

WHEREAS, in consideration of the actions that EPA has agreed to under the parties' Consent Decree, the parties intend that the Consent Decree will constitute a complete and final settlement of Claims One through Eight and Claim Fourteen of Plaintiff's Complaint;

WHEREAS, the parties intend for this Settlement Agreement to set forth terms for certain matters related to certain water quality standards that are not addressed in the Consent Decree; and

WHEREAS, Plaintiff and EPA have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair and equitable resolution of the claims raised to this action. The parties agree that it is in the interest of the public, the parties and judicial economy to resolve the issues in this action.

NOW, THEREFORE, the parties agree to this settlement in the manner, terms and conditions as follows:

GENERAL TERMS

1. The parties to the Settlement Agreement are Plaintiff and EPA. The parties understand that Michael O. Leavitt was sued in his official capacity as Administrator of the United States Environmental Protection Agency and this settlement applies to, is binding upon, and inures to the benefit of the parties, their officers, employees, successors and assigns.

2. For purposes of this Settlement Agreement, the following terms shall have the meanings provided below. All references in this Settlement Agreement to sections of the United States Code ("U.S.C."), the Code of Federal Regulations ("C.F.R.") or "implementing regulations" are to those sections in effect on the date of entry of this Settlement Agreement or to any amendments to these sections when those amendments become effective.

- a. "APA" shall mean the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706;
- b. "Consent Decree" shall mean the document entered into by the parties on _____ in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.);
- c. "CWA" shall mean the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*;
- d. "EPA" shall mean Michael O. Leavitt, the Administrator of EPA, or the Administrator's duly authorized representative, and the United States Environmental Protection Agency;
- e. "Plaintiff" shall mean the Missouri Coalition for the Environment;
- f. "Plaintiff's Complaint" shall mean the Complaint filed in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.), by Plaintiff on October 7, 2003;
- g. "September 8, 2000, letter" shall mean the letter dated September 8, 2000, from U. Gale Hutton, Director of Water, Wetlands, and Pesticides Division, EPA Region VII, to Stephen Mahfood, Director of Missouri Department of Natural Resources in Jefferson City, Missouri, that was attached as Exhibit A to Plaintiff's Complaint;
- h. "Settlement Agreement" shall mean this document;
- i. "Water Quality Standard" ("WQS") shall have the meaning provided at 40 C.F.R. § 131.3(i) and consist of the elements identified in 40 C.F.R. § 131.6, as of the date of entry of this Consent Decree, or as subsequently

amended.

CLAIMS NINE THROUGH TWELVE, FIFTEEN AND SIXTEEN AND RELEASE

3. The Parties understand that the state of Missouri intends to submit to EPA new Or revised water quality standards for review and approval or disapproval in a manner consistent with the CWA and other applicable law. Expected to be included in that submission are new or revised water quality standards for the following, which correspond to Claims Nine through Twelve, Fifteen and Sixteen of Plaintiff's Complaint:

- a. Outstanding National Resources Waters. EPA's September 8, 2000 letter, Section III(b)A expressed concern whether certain practices would provide an appropriate level of protection of Outstanding National Resources Waters. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.12(a)(3) and 131.6(d).
- b. Whole Body Contact Use. EPA's September 8, 2000 letter, in Section III(b)B expressed concern whether Missouri's approach to classifying surface waters for whole body contact use would attain the "swimmable" goal of the CWA and its implementing regulations. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.6(a), (f), and 131.10.
- c. Bacteriological indicator-primary contact recreation. EPA's September 8, 2000 letter, Section IV.A, encouraged the State to take appropriate action to address health risks posed by contaminated bathing beaches. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.6(c) and 131.11.
- d. Site Specific Water Quality Criteria. EPA's September 8, 2000 letter, Section IV.F, noted that water quality criteria must be scientifically sound and protective of the uses. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.6 and 131.11.
- e. Mixing Zones-Low Flow/Ephemeral streams. EPA's September 8, 2000 letter, Section IV.K, questions whether mixing zones for low flow/ephemeral waters would protect such streams. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.6(f) and 131.13.
- f. High Flow Exemption. EPA's September 8, 2000 letter, Section IV.L, expressed concern whether Missouri's exemption from the application of fecal coliform bacteria criteria at high flows would insure that whole body contact use is adequately protected. EPA recommended that Missouri consider other alternatives. EPA anticipates Missouri's revisions to meet 40 C.F.R. §§ 131.6(c), (f) and 131.11.

4. For each item described in Paragraph 3 above, on or before April 30, 2006, EPA agrees to determine, pursuant to 33 U.S.C. § 1313 (c)(4)(B), whether new or revised water quality standards are necessary to meet the requirements of the CWA. These determinations will address each of the issues identified in Paragraphs 3(a) through (f) above and the concerns raised in EPA's September 8, 2000 letter for each of the items in Paragraphs 3(a) through (f) above. The determinations will be made by the Administrator or the Administrator's duly authorized delegate with fully and lawfully delegated authority to make such determinations. The determinations also will be in writing that sets forth the factual and legal basis for the determination. If any such determination is made by a duly authorized delegate of the Administrator, the writing also shall state that the signatory has the authority to make the determinations therein. Within five (5) business days of each such determination, EPA shall send a copy of the determination via overnight mail as provided below in Paragraph 15.

5. In the event that by April 30, 2006, the State submits to EPA new or revised standards for all or part of any of the items described in Paragraphs 3(a) through (f) above, then Paragraph 4 shall not apply as to the part of such item for which a new or revised standard has been submitted. Not later than five business days after the State submits any such new or revised standard to EPA, EPA shall send signed notice via overnight mail as provided below in Paragraph 15.

CLAIM THIRTEEN

6. The parties understand that the State of Missouri intends to adopt new or revised water quality standards to identify antidegradation implementation procedures, which relate to Claim Thirteen of Plaintiff's Complaint.

7. For the item described above in Paragraph 6, on or before April 30, 2007, EPA agrees to determine, pursuant to 33 U.S.C. § 1313 (c)(4)(B), whether new or revised water quality standards are necessary to meet the requirements of the CWA. This determination will

address the issues identified in Paragraph 6 above and the concerns raised in EPA's September 8, 2000 letter for the item in Paragraph 6 above. The determination will be made by the Administrator or the Administrator's duly authorized delegate with fully and lawfully delegated authority to make such determinations. The determination will be in writing that sets forth the factual and legal basis for the determination. If the determination is made by a duly authorized delegate of the Administrator, the writing also shall state that the signatory has the authority to make the determination therein. Not later than five (5) business days of such determination, EPA shall send a copy of the determination via overnight mail as provided below in Paragraph 15.

8. In the event that by April 30, 2007, the State of Missouri submits new or revised water quality standards identifying the antidegradation implementation procedures identified above in Paragraph 6, then Paragraph 7 shall not apply. Not later than five (5) business days after the State submits any such new or revised standard to EPA, EPA shall send signed written notice via overnight mail as provided below in Paragraph 15.

EFFECTIVE DATE

9. This Settlement Agreement shall become effective upon the entry of the Consent Decree by the Court in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.) (the "Effective Date"). If for any reason the District Court does not enter the Consent Decree, the obligations set forth in this Settlement Agreement are null and void.

RELEASE BY PLAINTIFF

10. This Settlement Agreement and, when entered, the Consent Decree in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.), shall constitute a complete and final settlement of all claims against the United States based on matters which were asserted, or could have been asserted, by Plaintiff in the Complaint filed in that case.

11. Plaintiff hereby releases, discharges, and covenants not to assert (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or equity which it may knowingly or unknowingly have had, or may now have, against the United States based on matters which were asserted or could have been asserted by Plaintiff in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.). Within twenty (20) days of the effective date of this Settlement Agreement as provided above in Paragraph 9, Plaintiff shall file with the Court in the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.), a stipulation of dismissal pursuant to Fed. R. Civ. P. 41(a)(1), dismissing Claims Nine through Thirteen, Fifteen, and Sixteen of Plaintiff's Complaint, which are the subject of this Settlement Agreement.

12. Plaintiff's sole judicial remedy to address the merits of any final agency action, including but not limited to any determination by EPA under Paragraphs 4 and 7 above as to whether new or revised water quality standards are necessary, or any action by EPA to approve or disapprove any new or revised standard submitted by the State of Missouri for any item described in Paragraphs 3 or 6 above, is to file a new lawsuit to challenge such final action under the Clean Water Act and/or the APA, and Plaintiff reserves its rights to bring any such challenge. EPA reserves all of its defenses to any such suits. Nothing in this Settlement Agreement alters or affects the standards for judicial review of final EPA action.

DISPUTE RESOLUTION AND REMEDY FOR NON-COMPLIANCE

13. In the event of a disagreement between the Parties concerning the interpretation of any provision of this Settlement Agreement, or if EPA does not make the determinations described in Paragraphs 4 and 7 by the dates specified in those Paragraphs, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall confer in order to attempt to resolve the dispute within thirty (30) days of the

written notice, or such time thereafter as is mutually agreed to in writing. If the parties are unable to resolve the dispute within thirty (30) days of conferring, then the dissatisfied party's sole remedy is to apply to the Court to reactivate the case of *Missouri Coalition for the Environment v. Leavitt*, Case No.03-4217-CV-C-NKL (W.D. Mo.), to seek an order in that case pursuant to the Clean Water Act or the APA to obtain the same action identified in this Settlement Agreement. EPA does not waive or limit any defense relating to such litigation. The parties agree that contempt of court is not an available remedy under this Settlement Agreement.

AGENCY DISCRETION

14: Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA by law. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or review from time to time any actions EPA may perform pursuant to this Settlement Agreement, or to amend or promulgate regulations consistent with the CWA.

NOTICE

15. Any notice required or made with respect to this Settlement Agreement shall be in writing and shall be effective upon receipt. For any matter relating to this Settlement Agreement, the contact persons are:

For the Plaintiff

Edward J. Heisel
Attorney at Law
Missouri Coalition for the Environment
6267 Delmar Boulevard
Suite 2-E
St. Louis, MO 63130

For the Defendants

Michele L. Walter
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

Associate General Counsel
Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, DC 20004

Martha R. Steincamp
Office of Regional Counsel
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, KS 66101

For the State of Missouri

Aimee Davenport
Attorney, Missouri Department of Natural Resources
1731 E. Elm Street
P.O. Box 176
Jefferson City, MO 65102-0176

Association of Metropolitan Sewerage Agencies

Alexandra Dapolito Dunn (DC Bar #428526)
General Counsel
Association of Metropolitan Sewerage Agencies
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505

David W. Burchmore
Steven C. Bordenkircher
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

Counsel for Urban Areas Coalition

Terry J. Satterlee
Thomas J. Grever
Lathrop & Gage, L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684

Upon written notice to the other party, any party may designate a successor contact person for any matter relating to this Settlement Agreement.

REPRESENTATIVE AUTHORITY

16. Each undersigned representative of the parties to this Settlement Agreement certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Settlement Agreement. By signature below, all parties consent to entry of this Settlement Agreement.

MUTUAL DRAFTING

17. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the parties. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

COUNTERPARTS

18. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party has signed all other counterparts.

EFFECT OF SETTLEMENT AGREEMENT

19. The Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any party.

COMPLIANCE WITH OTHER LAWS

20. No provision of this Settlement Agreement shall be interpreted so as to constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the APA, 5 U.S.C. §§ 551-559, 701-706, the CWA, or any other law or regulation, either substantive or procedural.

APPLICABLE LAW

21. This Settlement Agreement shall be governed and construed under the laws of the

United States.

THIRD-PARTY BENEFICIARIES

22. Nothing in this Settlement Agreement shall be construed to make any other person or entity not executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

FORCE MAJEURE

23. The parties recognize that the performance of this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341, et. seq. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance. Should delay occur due to such circumstances, any resulting failure to meet the timetable set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines so affected shall be extended one day for each day of the delay. EPA will provide Plaintiff with notice as soon as is reasonably possible in the event EPA invokes this provision of the Settlement Agreement and will provide Plaintiff with an explanation of EPA's basis for invoking this provision.

MODIFICATION

24. This Agreement may be modified or amended only with the written consent of all parties.

FOR THE DEFENDANT MICHAEL O. LEAVITT

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Dated: 12-16-04

By: Michele L. Walter
Michele L. Walter
Environmental Defense Section
Environment and Natural Resources Division

U.S. Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

Of Counsel for the United States
Environmental Protection Agency:

Charles M. Thomas
Office of the United States Attorney
400 East 9th Street
5th Floor
Kansas City, MO 64106

Karen Clark
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, DC 20460

Martha R. Steincamp
Office of Regional Counsel
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, KS 66101

FOR THE PLAINTIFF MISSOURI COALITION FOR THE ENVIRONMENT:

Dated: 12/15/04

By: 

Edward Heisel
Missouri Coalition for the Environment
6267 Delmar Boulevard
Suite 2-E
St. Louis, MO 63130